70 FR 28279, May 17, 2005

A-405-803
POI: 04/01/2003-03/31/2004
AD/CVD Operations, O7/BJS
Public Document

MEMORANDUM: Joseph A. Spetrini
Acting Assistant Secretary
for Import Administration

FROM: Barbara E. Tillman
Acting Deputy Assistant Secretary
for Import Administration

SUBJECT: Issues and Decision Memorandum for Final Determination of the Antidumping Duty Investigation of Purified Carboxymethylcellulose from Finland

Summary

We have analyzed the case briefs submitted by interested parties for the antidumping duty investigation of purified carboxymethylcellulose (CMC) from Finland (A-405-803). As a result of our analysis, we have not made changes to the margin calculation. We recommend that you approve the positions we have developed in the "Discussion of the Issues" section of this memorandum. Below is the complete list of the issues in this review for which we received comments and rebuttal comments by parties:

1. Selection of Alternative Facts Available Margin

Background

On December 27, 2004, the Department of Commerce (the Department) issued the Preliminary Determination in the investigation of purified CMC from Finland.[1] The period of investigation (POI) is April 1, 2003 through March 31, 2004. On January 28, 2005, we received a case brief from petitioner[2] and on February 2, 2005, we received a rebuttal brief from the sole respondent, Noviant OY. Noviant OY did not file a case brief. A hearing was not held because petitioner withdrew its request for a hearing.

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[1] See Notice of Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination: Purified Carboxymethylcellulose From Finland, 69 FR 77216 (December 27, 2004) (Preliminary Determination)

[2] Petitioner in this investigation is Aqualon Company, a division of Hercules Inc.

Discussion of the Issues

Comment 1: Facts Available Methodology

As a result of Noviant OY's refusal to fully cooperate in the Department's questionnaire process, the parties provided comments on the Department's appropriate use of facts available prior to the Preliminary Determination. See Section 776(b) of the Tariff Act of 1930 (Tariff Act) and the Preliminary Determination at 77217. Because one of the party's comments was received by the Department just three days prior to the signature date of the Preliminary Determination, we did not have sufficient time to evaluate the latest comment in light of previously filed comments. See Id. at 77218. The Department accordingly used the petition initiation rate as adverse facts available (AFA) and postponed our evaluation of the parties' comments. See id.

Petitioner argues in its case brief that the Department should use information placed on the record by Noviant OY as adverse facts available, rather than relying on the petition initiation rate. Petitioner asserts that Noviant OY voluntarily disclosed information adverse to its interests regarding its home market prices which suggests the petition initiation rate is too low. According to petitioner, Noviant OY's December 13, 2004, submission referenced a home market invoice price included in Noviant OY's original section A questionnaire response. Petitioner claims that the home market price is higher than the home market price used by petitioner in its original antidumping petition, and by the Department in its initiation of this investigation. Petitioner also asserts the invoice price quoted by Noviant OY in its Section A response is a more accurate reflection of the prevailing price levels in Finland. Therefore, petitioner suggests that the dumping margin used by the Department in its Preliminary Determination is too low.

Petitioner argues that section 776(b)(4) of the Tariff Act permits the Department to use data other than the initiation margin as the basis for facts available. Petitioner admits the Department often relies on the information submitted in the petition and is reluctant to use other information on the record. See Petitioner's Case Brief at 4, citing Certain Hot-Rolled Carbon Steel Flat Products from South Africa: Final Results of Antidumping Duty Administrative Review, 68 FR 64853 (November 17, 2003) (Hot-Rolled Steel from South Africa). Petitioner argues this case may be distinguished from Hot-Rolled Steel from South Africa because the information placed on the record by respondent after the petition initiation is adverse to respondent and supersedes and corrects data in the petition.

Petitioner cites Cold-Rolled Steel from Slovakia as an example where the Department used as facts available information placed on the record after initiation by a respondent that subsequently refused cooperation at verification. See Petitioner's Case Brief at 4-5, citing Certain Cold-Rolled Flat-Rolled Carbon-Quality Steel Products form Slovakia: Notice of Final Determination of Sales at Less than Fair Value, 65 FR 34657 (May 31, 2000), and accompanying Issues and Decision Memorandum at Comment 2 (collectively Cold-Rolled Steel from Slovakia). In that case, petitioner asserts, the Department stated that the use of the petition margin in that instance would not be in keeping with the purpose of the adverse facts available provision which is "to

ensure that the party does not obtain a more favorable result by failing to cooperate than if it had cooperated fully." See Cold-Rolled Steel from Slovakia at Comment 2, citing Statement of Administrative Action, accompanying the URAA, H. Doc. No. 103-316, 870 (1994) (SAA).

Petitioner also argues that in non-market economy cases the Department has shown little reluctance to update the petition margin for facts available when new surrogate values have superseded or corrected the values of the petition. See, Petitioner's Case Brief at 5, citing, e.g. Notice of Final Determination of Sales at Less Than Fair Value: Barium Carbonate from the People's Republic of China, 68 FR 46577 (August 6, 2003); Notice of Final Determination of Sales at Less Than Fair Value: Saccharin From the People's Republic of China, 68 FR 27530 (May 20, 2003); and Notice of Final Determination of Sales at Less Than Fair Value: Urea Ammonium Nitrate Solutions from the Russian Federation, 68 FR 9977 (March 3, 2003). Further, petitioner claims the courts have found that the Department is authorized, even required, to use information placed on the record of the investigation after initiation as facts available when these later-discovered facts show the original petition margin can no longer be corroborated. See Petitioner's Case Brief at 4, citing Heveafil Sdn. Bhd. et al. v. United States, 58 Fed.Appx. 843, 850 (Fed.Cir. 2003), citing D & L Supply Co. et al. v. United States, 113 F3d. 1220, 1224 (Fed.Cir. 1997) (Heveafil).

Finally, petitioner claims the Department has in the past corroborated a petition margin in part by reference to the order of magnitude of the margins in corresponding investigations for the same product. See Petitioner's Case Brief at 6, citing Notice of Final Determination of Sales at Less than Fair Value: Stainless Steel Round Wire from Japan, 64 FR 17317, 17318 (April 9, 1999) (Stainless Wire from Japan). Petitioner suggests the same approach can be used here to corroborate Noviant OY's home market invoice by comparing the resulting margin to those found in the concurrent investigations. See Petitioner's Case Brief at 6.

Noviant OY argues petitioner's use of Noviant OY's sample home market invoice ignores "parallel and qualitatively identical information on the record" regarding Noviant OY's U.S. prices: a sample U.S. invoice. Noviant OY asserts that if the Department chooses to use Noviant OY's home market sales information, the Department must apply the same analytical standard to the corresponding U.S. price information on the record, the invoice for a U.S. sale. See Noviant OY's Rebuttal Brief at 2. When the two sample invoices are compared, Noviant OY claims it is not dumping. Noviant OY also claims that its Section A Quantity & Value table supports the conclusion that Noviant OY is not dumping. Id.

Noviant OY claims the Department's use of the petition initiation rate as AFA in the Preliminary Determination satisfies the statutory purpose and should not be reversed. Citing the Preliminary Determination, Noviant OY argues it is the Department's practice to use the petition initiation rate as AFA when a respondent fails to cooperate in an investigation. See Preliminary Determination at 77218. Noviant OY claims the petitioner fails in its attempt to distinguish the instant case from Hot-Rolled Steel from South Africa. To the contrary, Noviant OY argues the case is directly on point and confirms the Department's practice. When faced with an

uncooperative respondent in that case, Noviant OY suggests, the Department used the initiation rate as AFA. See Noviant OY's Rebuttal Brief at 7 and 8.

Noviant OY argues the Department should reject petitioner's position that a revised AFA margin calculated using data from the Section A home market invoice is corroborated by the other margins determined for the Noviant Group companies. Noviant OY claims the products from the Noviant entities are different and the Noviant OY Finland plant is not capable of producing the purified CMC grades made in the Netherlands and Sweden. See Noviant OY's Rebuttal Brief at 9.

Department's Position. We agree with respondent. The Department sees no reason to vary from its standard practice of using the initiation rate as AFA in an investigation where the sole respondent has refused to cooperate with the Department's questionnaire process.

Petitioner attempts to distinguish this situation from Hot-Rolled Steel from South Africa. In Hot-Rolled Steel from South Africa, an administrative review, petitioners argued that the Department should not use the petition rate as an AFA margin because, they argued, the petition rate had not been proven sufficiently adverse. They argued that the respondent continued to dump and continued to fail to cooperate in subsequent administrative reviews. Thus, they argued the need to update the petition-based AFA margin to reflect a rate which would induce cooperation by the respondents. See Hot-Rolled Steel from South Africa, and accompanying Issues and Decision Memorandum at Comments 1, 2, and 3. Despite petitioners' arguments in that case, the Department stated that only in unusual and rare circumstances has the Department calculated an AFA rate rather than use the highest rate determined in the proceeding. Examples of such cases have included (1) long periods of time between the initial imposition of the AFA rate and the new rate as in Barium Chloride from the People's Republic of China; Final Results and Recission in Part of Antidumping Duty Administrative Review, 68 FR 12669 (March 17, 2003) (Barium Chloride from China); (2) extremely low AFA rates and continuous noncooperation by a number of respondents, as was the case in Steel Wire Rope from the Republic of Korea; Final Results of Antidumping Duty Administrative Review and Revocation in Part of Antidumping Duty Order, 63 FR 17968 (April 13, 1998) (Steel Wire Rope from Korea); and (3) substantial changes in the price and cost/factor-input information, as in Sodium Thiosulfate from the People's Republic of China; Final Results of Antidumping Administrative Review, 58 FR 12934 (March 8, 1993) (Sodium Thiosulfate from China).

The Department did not find that the circumstances presented in Hot-Rolled Steel from South Africa warranted deviating from its standard practice in selecting an AFA rate. Similarly, in this case none of the above scenarios apply and petitioner has therefore failed to distinguish this case from Hot-Rolled Steel from South Africa.

In Barium Chloride from China, the Department determined that the China-wide rate calculated in the 1985-1986 administrative review did not bear a rational relationship to the practices of the China-wide entity during the 2000-2001 review. The instant case is an investigation and, as

such, the rate from the petition is reasonably current, and reflects a rational relationship to the respondent's selling practices during the POI. Second, we do not find that the petition rate is insufficiently high to induce cooperation as in Steel Wire Rope from Korea, because in this case, there is not a record of continuous noncooperation by respondent. Third, Sodium Thiosulfate from China is inapplicable as, unlike this case, that case involved an administrative review in which we found that the evidence presented indicated that price and costs in the industry had changed substantially since the investigation.

Petitioner argues the price found in Noviant OY's Section A home market sample documentation supersedes and corrects data in the petition. Petitioner also cites Cold-Rolled Steel from Slovakia as an example where the Department used as facts available information placed on the record by a respondent that subsequently refused verification and cooperation. However, the primary difference between this case and Cold-Rolled Steel from Slovakia is that in the latter, a purportedly complete sales database was submitted to the Department. Thus the Department had information on the record concerning what the respondent purported to be its entire universe of sales. See Cold-Rolled Steel from Slovakia at Comment 2. In the instant case, the only home market price information on the record is a petition affidavit and a sample Section A home market invoice. In the absence of further record information, the Department cannot conclude that the sample home market invoice supersedes and corrects data in the petition.

Petitioner's argument that the Department has shown little reluctance to update the petition margin used for facts available when new surrogate values have superseded or corrected the values in the petition is misplaced. In calculating factors of production values for non-market economy cases, both the aim and methodology differ from market economy cases. The Department's task in the valuation of factors of production is "to calculate what a producer's costs or prices would be if such prices or costs were determined by market forces." See Notice of Final Determination of Sales at Less Than Fair Value: Urea Ammonium Nitrate Solutions from the Russian Federation, 68 FR 9977 (March 3, 2003), and accompanying Issues and Decision Memorandum at Comment 1, citing Yantai Oriental Juice Co. v. United States, No. 00-07-00309, Slip Op. 02-56, at 7 n.5 (CIT 2002). The Department considers many aspects of information in choosing a surrogate value, for example: whether it is publicly available, whether it is contemporaneous, whether it is representative of a large sample of prices, and how closely it matches the factor of production at issue. See Notice of Final Determination of Sales at Less Than Fair Value: Saccharin From the People's Republic of China, 68 FR 27530 (May 20, 2003), and accompanying Issues and Decision Memorandum at Comment 1. The Department's practice of revising surrogate values as necessary in a nonmarket economy is controlled by different statutory and regulatory provisions, for different purposes, and thus, is inapplicable in this market economy case.

Petitioner is also incorrect in its interpretation of Heveafil to this case. The Court in Heveafil held that because respondent Heveafil's assigned AFA rate was based on the rate that was subsequently invalidated in litigation, that invalidated rate could not serve as the AFA margin for

Heveafil. See Heveafil at 850. As the AFA rate in this case has not been invalidated in the course of judicial review, Heveafil is inapplicable.

Finally, petitioner is incorrect that, based on Stainless Wire from Japan, the Department may corroborate the petition margin with reference to information contained in the parallel Netherlands and Sweden investigations. Petitioner argues that because the parallel investigations of Noviant entities in the Netherlands and Sweden involve the same product and the same producer, it is not unreasonable for the Department to take note that the margin resulting from the use of Noviant OY's sample home market invoice in the Finland case falls between the margins in the Netherlands and Sweden investigations.

The facts of Stainless Wire from Japan are not quite as petitioner has described. There was no "cross-over" between countries in calculating an AFA rate in the stainless wire cases. Those cases arose out of parallel investigations of the subject merchandise in Canada, India, Japan, Korea, Spain, and Taiwan. See Notice of Preliminary Determinations of Sales at Less Than Fair Value and Postponement of Final Determinations– Stainless Steel Round Wire from Canada, India, Japan, Spain, and Taiwan; Preliminary Determination of Sales at Not Less Than Fair Value and Postponement of Final Determination– Stainless Steel Round Wire from Korea, 63 FR 60402 (November 18, 1998). Two respondents in Japan and one respondent in Spain failed to respond to the Department's questionnaire. As a result, the Department assigned the Japanese respondents the highest petition margin in the Japan investigation (29.56 percent) and the Spanish respondent the highest petition margin in the Spain investigation (35.80 percent). See id. at 64044. Petitioner proposes that the Department take note of the dumping margins found in the Dutch and Swedish investigations of purified CMC believing that the facts of Stainless Wire from Japan support such an analysis. We decline to do so because we do not believe that the facts on this case warrant such an application or that our selections of AFA in previous cases support such a finding. Indeed, even Stainless Wire from Japan supports our position of looking to the highest margin in the petition as applied to each individual country and order as the basis for adverse facts available.

Recommendation

Based on our analysis of the comments received, we recommend adopting all of the above positions. If these recommendations are accepted, we will publish the final determination in the Federal Register.

AGREE _____ DISAGREE _____

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Joseph A. Spetrini
Acting Assistant Secretary
for Import Administration

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Date